IN THE SUPREME COURT OF THE STATE OF OREGON

KEVIN L. LAMSON, Plaintiff-Respondent, Petitioner on Review, v. CRATER LAKE MOTORS, INC., an Oregon corporation, Defendant-Appellant, Respondent on Review.	)	Supreme Court No. S055625 Court of Appeals No. A130759 Jackson County Circuit Court Case No. 042609L3

AMICUS BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL

On Review of a Decision of the Court of Appeals
December 5, 2007
Opinion by: Edmonds, Presiding Judge
Concurring: Wollheim and Sercombe, Judges

From a Judgment of the Jackson County Circuit Court
The Hon. Daniel L. Harris, Presiding

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I. Introduction

Amicus Curiae Oregon Association of Defense Counsel ("OADC") appears in support of defendant's positions in this case. Specifically, OADC appears in order to answer the question whether an employee who is discharged for complaining to his employer about unlawful conduct by a co-worker can sue for damages in tort for wrongful discharge. Although plaintiff and OTLA do not directly confront that issue, the question is implied in the tests they urge. The answer is that a plaintiff has no action for wrongful discharge based on internal complaints because the legislature has preempted the field by protecting only specific employee reports regarding criminal conduct. ORS 659A.230.

II. Plaintiff Does Not Have a Claim for Wrongful Discharge

Plaintiff brought this wrongful discharge claim against defendant, his employer, alleging he was discharged because he made internal reports regarding what he believed was unethical and unlawful conduct on the behalf of RPM, a company contracted to hold a car sale for defendant. *Lamson v. Crater Lake Motors, Inc.*, 216 Or App 366, 373, 173 P3d 1242 (2008), *rev allowed*, 344 Or 390 (2008). Under the threat of possible discharge, plaintiff willfully refused to participate in the sale and defendant terminated him for not showing up for work. *Id.* at 372.

At trial, defendant moved for a directed verdict on the ground plaintiff failed to prove a claim for wrongful discharge. The trial court denied the motion and the jury returned a verdict for plaintiff. *Id* at 373. On appeal, the court reversed, holding the law does not recognize a claim for wrongful discharge on these facts because "plaintiff was

not discharged for fulfilling what the law would recognize as an important *public* duty." *Id* at 383 (emphasis in original).

This court first recognized a common-law action for wrongful discharge in *Nees v. Hocks*, 272 Or 210, 536 P2d 512 (1975). The court reaffirmed the rule of at-will employment: "[I]n the absence of a contract or legislation to the contrary, an employer can discharge an employee at any time for any cause." *Id.* at 216. The court nonetheless recognized limited situations in which an employer can be held liable for damages in tort when the discharge of an employee is for a "socially undesirable motive." *Id.* at 218. The narrow exception applies in two situations only: 1) when an employee performs an important public duty or societal obligation and is fired for doing so; and 2) when an employee exercises private statutory rights which reflect an important public policy related to his or her employment. *Babick v. Oregon Arena Corp.*, 333 Or 401, 407, 40 P3d 1059 (2002).

This case does not involve the exercise of a private statutory right, and defendant has demonstrated in its merits brief that plaintiff's refusal to participate in the sale does not reflect an important public policy or societal obligation. An important public duty may not be created by the court; it must exist in constitutional or statutory provisions, or in case law. *Id.* at 409. Courts have found an important public duty when an employee's conduct is specifically required or encouraged by the law, or when the law demonstrates that high social value is placed upon the employee's conduct. *See Delaney v. Taco Time Int'l.*, 297 Or 10, 681 P2d 114 (1984)(employee fulfills an important public duty in refusing to

defame another employee); *Nees*, *supra* (employee discharged for jury service was performing an important public duty); *Anderson v. Evergreen International Airlines, Inc.*, 131 Or App 726, 886 P2d 1068 (1994), *rev den*, 320 Or 749 (1995) (violation of public policy found when employee, an aircraft engineer, was discharged for refusing to follow his employer's orders to violate numerous FAA regulations); *Banaitis v. Mitsubishi Bank, Ltd.*, 129 Or App 371, 879 P2d 1288 (1994), *rev dismissed as improvidently allowed*, 321 Or 511 (1995) (discharged bank employee's refusal to disclose a client's financial information to another bank was furthering an important public policy); *Campbell v. Ford Industries, Inc.*, 274 Or 243, 249, 546 P2d 141 (1976) (court held complaint alleging employer's refusal to allow employee stockholder to examine books and records of employer corporation did not state a claim for wrongful discharge because the employee's interest was purely private and not of general public concern).

The Court of Appeals properly held this case does not involve an "important *public* duty" because plaintiff's refusal to work at the RPM sale, to avoid condoning what he believed was unlawful activity, does not rise to the level of an important public duty. In fact, plaintiff's efforts to protect his image were "purely private and not of general public concern." *Campbell* at 249. Unlike the plaintiff in *Anderson*, plaintiff was not required to engage in unlawful conduct, and this attempt merely to safeguard his reputation does not entitle him to a tort remedy for wrongful discharge under the public policy exception to the at-will employment rule. Plaintiff could establish neither that his conduct was required or encouraged under a particular law, nor that his refusal to participate in the sale somehow

furthered some important public policy. The Court of Appeals correctly held that defendant's discharge of plaintiff did not amount to a tort "under the applicable law regarding at-will employment." *Lamson* at 383.

The purpose of allowing a wrongful discharge claim is to provide recourse in the absence of a remedy adequate to protect the interests of both society and of employees. *Brown v. Transcon Lines*, 284 Or 597, 613, 588 P2d 1087 (1978). If one of the exceptions to at-will employment is not met, no claim may be recognized. As the Court of Appeals has held, "wrongful discharge is an interstitial tort designed to fill a gap where a discharge in violation of public policy would otherwise not be adequately remedied." *Dunwoody v. Handskill Corp.*, 185 Or App 605, 613, 60 P3d 1135 (2003).

To expand the claim for wrongful discharge under these facts would abrogate employment at-will as we know it: employees could refuse to come to work upon the belief unlawful activity may occur. Without more, such as employer coercion to engage in unlawful conduct, employees would be allowed to miss work indefinitely, without recourse, and, effectively, prescribe policy in the workplace. This, of course, would be entirely at odds with the rule of employment at-will, but it is the inescapable result of recognizing a viable claim in the circumstances presented. The legislature chose, for whatever reason, not to intrude into the employment relationship to that degree, and the court should respect that choice.

III. The Court Should Not Expand Oregon Law by Adopting a New Common-law Tort Based on Internal Complaints of Unlawful Conduct; the Legislature Has Preempted the Area by Addressing Only External Reports of Criminal Conduct.

The legislature has provided remedies for employees who are discharged for reporting unlawful conduct. ORS 659A.230; ORS 659A.885.[1] In so providing, the legislature has identified a remedy only for employees who are discharged for making external reports about criminal activity. ORS 659A.230 makes it an "unlawful employment practice" for an employer to

> "discharge * * * an employee * * * for the reason that the employee has in good faith reported criminal activity by any person, has in good faith caused a complainant's information or complaint to be filed against any person, has in good faith cooperated with any law enforcement agency * * *."

ORS 659A.230 "advances the public policy of encouraging citizens to assist in the enforcement of state and federal laws." *Jensen v. Medley*, 170 Or App 42, 57, 11 P3d 678 (2000), *rev'd on other grounds*, 334 Or 411 (2002) (discussing *former* ORS 659.550, now ORS 659A.230, as a whistleblower statute making it an unlawful employment practice to retaliate against an employee who reports, in good faith, suspected criminal activity).

"Reporting" is not defined in the statute, but the context makes clear that only external employee reports of criminal conduct in order to initiate or aid in a civil or criminal proceeding are covered. Because reporting internally is not recognized within

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[1]ORS 659A.230 and ORS 659A.885 are set out in full at Appendix 1 and 2.

ORS 659A.230, the legislature has not provided a remedy for the specific conduct involved in this case. There is no evidence that plaintiff's internal reporting was intended or likely to result in apprising the proper authorities of criminal conduct by RPM.

Courts in other jurisdictions have held that employees who only make internal reports regarding criminal conduct cannot maintain actions for wrongful discharge. Although not controlling in Oregon, the cases illustrate that other courts share Oregon's narrow exceptions to at-will employment. *See, e.g., Burnham v. Karl & Gelb P.C.*, 252 Conn. 153, 160, 745 A2d 178 (2000) (holding that when legislature has provided a remedy which requires employee to report to an external public body, employee had no claim for wrongful discharge for internal complaints regarding a dental association's safety violations); *House v. Carter-Wallace, Inc.*, 232 NJ Super 42, 48-49, 556 A2d 353 (1989), *certification denied*, 117 NJ 154 (1989) (holding employee who voiced objections to corporate decisions, but never communicated concerns regarding alleged public policy violations to outside authorities, has no claim for wrongful discharge); *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 293, 774 P2d 432 (1989) (holding internal reports made to an employee's manager regarding his supervisor's illegal conduct, rather than to the appropriate authorities, does not give rise to claim for wrongful discharge because employee was acting in a private or proprietary manner).

This court should not create a civil remedy in an area in which the legislature has determined not to create one. The Court of Appeals recognized this in *Shuler v. Distribution Trucking Co.*, 164 Or App 615, 620, 994 P2d 167 (1999), *rev den*, 330 Or 375

(2000) when it construed a whistleblower statute and stated that when "the legislature intends broader protection, it provides for it expressly." The *Shuler* court determined the words "has testified" in *former* ORS 659.035, (now ORS 659A.233) did not expressly or by implication cover *attempts* to testify, *willingness* to testify, or *overtures and preparation* in anticipation of testifying.[2] *Id.* at 620 (emphasis added). The court found support for this conclusion in contrasting a similar whistleblower statute, ORS 654.062(5)(a), in which the legislature used the wording "has testified or *is about to* testify." *Id.* (emphasis in *Shuler*). The court also considered *former* ORS 659.030(1)(f), (now ORS 659A.030) which provides discrimination is prohibited against a person who "has filed a complaint, testified, or *assisted* in any proceeding * * * or *has attempted to do so*." *Id.* (emphasis in *Shuler*). The *Shuler* court concluded that it could not extend ORS 659.035 to persons who are only present or willing to testify because, to do so, would be adding words to the statute in violation of ORS 174.010. *Id.* at 621. When the legislature intends to protect a particular act, it says so. *Id.* at 620-21.

The legislature addressed employee complaints about unlawful activity in ORS 659A.230, and expressly provided only for employment protection to employees for externally reporting criminal activities. If the legislature wanted to include protection for

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[2]In *Shuler*, plaintiff brought a claim for wrongful discharge against his employer under *former* ORS 659.035, which granted protection for employees against discharge or retaliation for the reason that an employee has testified at an unemployment compensation hearing. *Id.* at 619. Plaintiff alleged that because he was present, ready and willing to testify at a co-worker's unemployment compensation hearing, but in fact did not testify, he was wrongfully discharged. *Id.* at 617.

internal reporting, it could have done so. The court should refuse the invitation to legislate in an area in which the legislature has spoken, and determined not to reach, because the court's responsibility is to "apply and interpret the law, not to assume the role of a legislative chamber." *Holien v. Sears, Roebuck and Co.*, 298 Or 76, 95-96, 689 P2d 1292 (1984). The court should follow the rule of restraint it stated in *Burnette v. Wahl*, 284 Or 705, 712, 588 P2d 1105 (1978) and reaffirmed in *Holien:*

> "If there is any chance that invasion into the field by the court's establishment of a civil cause of action might interfere with the total legislative scheme, courts should err on the side of non-intrusion because it is always possible for the legislature to establish such a civil cause of action if it desires. Courts have no omnipotence in the field of planning, particularly social planning of the kind involved here. Courts should exercise restraint in fields in which the legislature has attempted fairly comprehensive social regulation."

Burnette v. Wahl, at 712; *Holien*, at 96.

Where, as here, the legislature has spoken on the nature of employee reports of unlawful conduct that may give rise to unlawful employment practices, the court should respect the legislature's choice and refuse the invitation to legislate a new claim for a remedy outside the reach of the statute.

IV. Conclusion

Plaintiff does not have a claim for wrongful discharge under these facts, and the court should affirm the Court of Appeals' decision in favor of defendant. The Court of Appeals properly determined that internal reports of unlawful conduct are not of a sufficient public interest to support a claim for wrongful discharge. Moreover, the court should reject the unstated but nevertheless obvious invitation to expand employment

protections on the facts of this case. The legislature has provided a remedy for wrongful termination only to those employees who make external reports about criminal conduct. The court should not expand the statutory scope by effectively legislating a broader cause of action based only on internal reports.

DATED this 16th day of July 2008.

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APPENDIX

ORS 659A.230 provides:

"**Discrimination for initiating or aiding in criminal or civil proceedings prohibited; remedies not exclusive.** (1) It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported criminal activity by any person, has in good faith caused a complainant's information or complaint to be filed against any person, has in good faith cooperated with any law enforcement agency conducting a criminal investigation, has in good faith brought a civil proceeding against an employer or has testified in good faith at a civil proceeding or criminal trial.

(2) For the purposes of this section, "complainant's information" and "complaint" have the meanings given those terms in ORS 131.005.

(3) The remedies provided by this chapter are in addition to any common law remedy or other remedy that may be available to an employee for the conduct constituting a violation of this section."

ORS 659A.885 provides, in part:

"**Civil Action**. (1) Any person claiming to be aggrieved by an unlawful practice specified in subsection (2) of this section may file a civil action in circuit court. In any action under this subsection, the court may order injunctive relief and any other equitable relief that may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay *** the court may allow the prevailing party costs and reasonable attorney fees at trial and on appeal. Except as provided in subsection (3) of this section:

> (a) The judge shall determine the facts in an action under this subsection; and
>
> (b) Upon any appeal of a judgment in an action under this subsection, the appellate court shall review the judgment pursuant to the standard established by ORS 19.415 (3).

(2) An action may be brought under subsection (1) of this section alleging a violation of ORS * * * 659A.230 * * *.

(3) In any action under subsection (1) of this section alleging a violation of ORS * * * 659A.230 * * *:

> "(a) The court may award, in addition to the relief authorized under subsection (1) of this section, compensatory damages or $200, whichever is greater, and punitive damages;
>
> "(b) At the request of any party, the action shall be tried to a jury;
>
> "(c) Upon appeal of any judgment finding a violation, the appellate court shall review the judgment pursuant to the standard established by ORS 19.415 (1); and
>
> "(d) Any attorney fee agreement shall be subject to approval by the court * * *."

CERTIFICATE OF FILING AND SERVICE

I certify that on the 16th day of July 2008, I served the foregoing AMICUS BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL on the following attorneys:

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by mailing two true and correct copies thereof, placed in sealed envelopes address to them at the addresses set forth above and deposited in the U.S. Post Office at Portland, Oregon on the same day with postage paid.

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On the same day and by the same method, I certify that I filed the original and 12 copies of the foregoing AMICUS BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL with :

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